SUPREME COURT, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

NO. 09-1327

STATE OF MISSOURI,

Petitioner,

v. **CAPITAL CASE**

MARK GILL,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S STATEMENT OF THE CASE

Because the state has failed to include a number of relevant and probative facts which facts establish that trial counsel's failure to review police report discovery provided to them by the state was unreasonable and prejudicial and has distort[illegible] what the Missouri Supreme Court actually decided, respondent presents its own statement of relevant facts.

I. Relevant Facts of the Offense

Mark Gill and his co-defendant Justin Brown were convicted in separate trials of the first degree murder of Ralph Lape. *State v. Gill*, 167 S.W.3d 184 (Mo. banc 2005) and *State v. Brown*, 246 S.W.3d 519 (Mo. App., S.D. 2008). The state sought death against both, but only obtained death against Gill. Lape had lived alone before Gill began living with Lape (T.Tr.636). Gill and Brown abducted Lape. Each claimed that the other shot Lape. *State v. Gill*, 167 S.W.3d at 188; *Brown*, 246 S.W.3d at 530. After Lape's death, they used Lape's ATM card to make purchases (T.Tr.731-36). They used Lape's computer to transfer money from one of Lape's bank accounts to another so that the money could be accessed using Lape's ATM card (T.Tr.729-36,828). When the New Mexico Highway Patrol stopped the car Gill was riding in and arrested Gill, he had with him Lape's ATM card and Lape's computer hard drive(T.Tr.822,876-89,961-65).

II. The State's Trial Evidence and Arguments

In Cape Girardeau County Prosecuting Attorney Swingle's guilt phase opening statement, he told the jury that victim Ralph Lape had been "a [G]ood [S]amaritan" who had afforded Mr. Gill the opportunity to live on his property because Gill "was down and out and needed a place to stay" (T.Tr.587).[1] During initial guilt closing argument, Swingle argued that Lape "had given this man a place to stay, a roof to have over his head," and that resulted in his death (T.Tr.1084).

In penalty phase Lape's sister, Diane Miller, testified that without Swingle's request, she had prepared a photo album that she brought him because she "wanted [Swingle] to see the person" he represented (T.Tr.1171). There were many pictures of Lape with his daughter, Megan. Those pictures included and highlighted: (1) at the hospital with Megan the day she was born (T.Tr.1173); (2) Megan's first day of school when Lape had gotten her ready (T.Tr.1174); and (3) two pictures from Megan's high school graduation (T.Tr.1183). Lape's daughter Megan testified that someday she would get married "and I won't have my dad to walk me down to the aisle and tell me how proud he is of me" (T.Tr.1225).

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[1] At trial, the state was represented by local county prosecutor Swingle. At all other relevant times since, the state has been represented by the Missouri Attorney General's Office.

Diane testified that Lape went to St. Ambrose Catholic School (T.Tr.1170). Lape was not the type of person who "gossip[ed]" about people (T.Tr.1184).

Diane read a prepared statement (T.Tr.1185). That written statement included Lape was the eldest, "the example for all the rest," and shouldered that responsibility "never complaining" while highlighting Lape's generosity (T.Tr.1186,1190). Diane read: "the proudest and happiest day of Ralph's life was the day his daughter Megan was born" (T.Tr.1187). Lape behaved like "Mr. Mom" (T.Tr.1187). Diane's husband, Mitch Miller, testified that he had studied with Lape the "valuable good life lessons" of the old west culture and characters (T.Tr.1195).

Lape's brother Steven Lape read a prepared statement (T.Tr.1218). Steven described how Ralph Lape's school teachers had held him in high regard (T.Tr.1220). Steven testified that after Lape's death he learned "how generous" Lape had been having paid for a friend's wife's funeral (T.Tr.1221). Steven concluded his testimony invoking a quote from Lincoln's Gettysburg address as epitomizing Lape's character (T.Tr.1221-22). The Lincoln quote was: "The world will little note, or long remember what we say here. But they will never forget what we did here" (T.Tr.1221-22).

III. The Postconviction Case

Gill was represented at trial by two attorneys from the Missouri Public Defender's Capital Case Defense Office, David Kenyon and Sharon Turlington.

Both Kenyon and Turlington had substantial capital case experience (29.15Tr.112-15, 273-75).

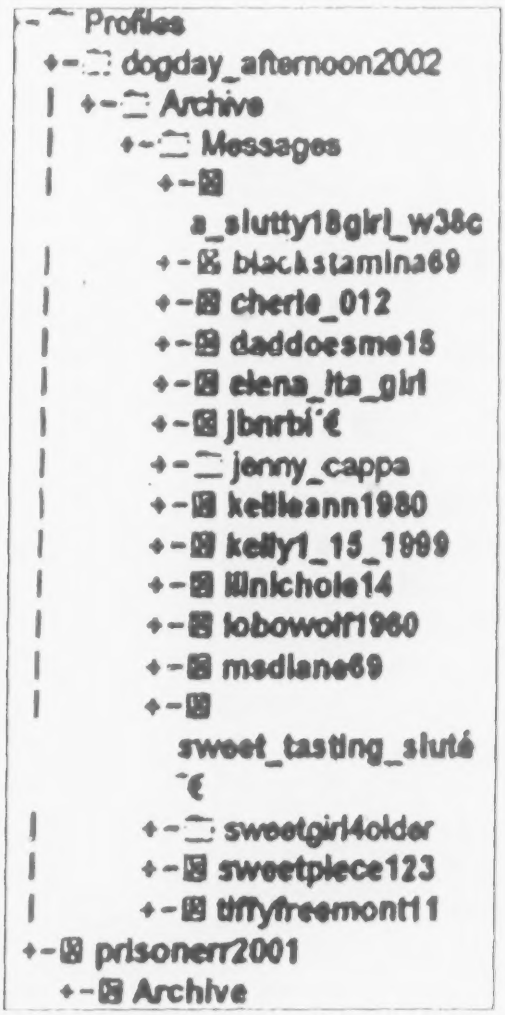
Police Officer David James was listed in discovery that was provided as the "officer in charge" of the investigation (29.15Tr.148). James prepared the probable cause to charge statement which recited that the car Gill was arrested in "had Lape's computer in the car" (29.15Ex.69). Swingle filed an information that listed James as a state's witness (29.15Ex.67-68;29.15Tr.126-28). Throughout the police report discovery that was provided to counsel, James' name was repeated (29.15Tr.129-53). It was Officer James who obtained consent to search Lape's computer from Lape's sister Diane (29.15Tr.142-43). In Prosecutor Swingle's Answer to Request For Discovery, he listed Lape's computer as something he might introduce (T.L.F.91;29.15Ex.95 at 20-21).

Counsel never interviewed and never deposed Officer James (29.15Tr.123-24,295-96;29.15Ex.69). During a pretrial deposition Kenyon took of a witness who owned lakehouse property with Lape, Kenyon explained to that witness he "like[s] to take depositions of anybody that has **any kind of familiarity** with the case **at all**...." (29.15L.F.403 transcript at p.4) (emphasis added).

Officer James prepared an Encase report of an analysis he did of Lape's computer and that report was disclosed to Gill's counsel (29.15Tr.176-77;29.15Ex.15 at 5125). Page 1 of the Encase report stated that the Encase information "was acquired by Lt. David James" (29.15Ex.15 at 5125).

Counsel for respondent apologizes for having to present in detail the disgusting, shocking content of the sexual material Lape put on his computer. Counsel does not believe, however, that this Court can fully appreciate how the state misrepresented Lape's character to the jury without doing so. Moreover, counsel does not believe this Court can truly appreciate the impact this evidence would have had on the outcome of the penalty phase without being informed of the details of the child pornography, Lape's chats about his daughter's anatomy and his attraction for it, and other sexually explicit material.

File names, as they appeared, in Officer James' Encase report included:



(29.15Ex.15 at 5128). James knew from reviewing Lape's computer and preparing his Encase report that there was much pornography, including child pornography, on Lape's computer (29.15Ex.93 at 22-24).

Kenyon reviewed the Encase report before trial and did not notice anything that alerted him there was pornography on Lape's computer (29.15Tr.167-69).

Since trial Kenyon has reviewed the Encase report more closely and there were entries whose names should have alerted him to the possibility of pornography on Lape's computer (29.15Tr.167-69;29.15Ex.15 at 5128). Turlington testified similarly (29.15Tr.303).

At Gill's postconviction hearing, computer expert Chatten, who uncovered Lape's computer's sexual content for the co-defendant's counsel, testified about what he found on Lape's computer. Lape's computer contained the Yahoo profile "dogday____afternoon2002" (29.15Tr.613). That profile displays a standing white male with his erect penis exposed from the navel downward (29.15Tr.613-14;29.15Ex.92). The "real name" appears as "Ralph" (29.15Tr.614). Listed as "hobbies" were the following: "boating, fishing, camping, socializing with friends, drinking beer on my boat, and … Oh, and sex, all kinds, except I don't do men. So guys don't ask." (29.15Tr.614).

Lape's computer also contained a profile "prisonerr2001" (29.15Tr.617). This profile contains a facial picture with the name "Ralph" (29.15Tr.617). That profile states as "hobbies:" "fishing, boating, camping sex. No males, just females, one or more okay"(29.15Tr.618). Favorite quote is "want to" (29.15Tr.618).

There were several relevant chats by Lape as "dogday____afternoon2002." The entire chat "lobowolf1960" done by Lape was as follows:

dogday_afternoon2002 (11:44:45): yes, but my daughter lives with her mom
dogday_afternoon2002 (11:44:51): how about you
unknown (11:44:54): how old is she?
unknown (11:45:00): i have a 17 year old daughter
dogday_afternoon2002 (11:45:08): mine is 17 too
unknown (11:45:21): she pretty hot?
unknown (11:45:44): ?
dogday_afternoon2002 (11:45:53): you bet, really stacked
dogday_afternoon2002 (11:45:56): yours
unknown (11:46:19): same here...5'7"...140..blonde hair....long legs...blue eyes...that tight teen girl ass...38c
unknown (11:48:22): yours?
dogday_afternoon2002 (11:47:31): dirty blonde, blue eyes, 59" I dont know her weight but she has terrffic tits
unknown (11:47:49): MMMMMmmmmmmmmmm...my daughter is cory.....your daughters name?
dogday_afternoon2002 (11:47:57): megan
unknown (11:48:12): megan have a nice ass??
dogday_afternoon2002 (11:48:31): yes really tight and firm and round
unknown (11:48:43): how often you get to see her?
dogday_afternoon2002 (11:48:57): bout 1once a week
unknown (11:49:15): does she ever wear short shorts...shorts skirts when she is around you??
unknown (11:49:27): cory does al of the time.....drives me nuts....
dogday_afternoon2002 (11:50:03): mine too, and those little half tops, her tits are so big, they wont hardly stay in
unknown (11:50:24): mmmmmmmmmmmmmmmmmmm...she like to give you nice views of her tits??
dogday_afternoon2002 (11:51:01): yeh, she teases me alot, how about cory
unknown (11:51:49): oooohhhhhhhhhyes ...sh eloves showing off her ass..she is a swimmer and her ass is soooooooooo smooth and firm....and those tits.....man....so firm and big.....gets me hard just thinking of them..
unknown (11:52:01): you ever jo thinkg about megan??
unknown (11:52:36): maybe??
dogday_afternoon2002 (11:52:49): all the fucking time
dogday_afternoon2002 (11:52:57): you ever messed with cory
unknown (11:53:20): she has let me jo on her tits ...and ass cheeks ..we just started.....you and megan do anything?
unknown (11:53:52): you there?
dogday_afternoon2002 (11:54:13): mmmmmmmmmmmmmmmmmmmmmm
dogday_afternoon2002 (11:54:26): corry, like you suckin on her tits
unknown (11:54:38): yesssssssss.....you and megan do much??
dogday_afternoon2002 (11:55:05): just touchy feely things, but I sure want more
unknown (11:55:29): are you hard right now??
dogday_afternoon2002 (11:55:51): working on it, LOL
dogday_afternoon2002 (11:56:02): does cory live with you
unknown (11:56:15): yes
unknown (11:56:29): ever get a nice close view of megans ass???
dogday_afternoon2002 (11:56:58): yeh, she lays on the floor and watches, TV nice shot of her ass then
unknown (11:57:17): what doess he wear doing that????
unknown (11:57:36): cory does the same thing...that is how i started jo on her ass cheeks
dogday_afternoon2002 (11:57:38): usually shorts
dogday_afternoon2002 (11:57:46): sometimes her panties
unknown (11:57:55): you get hard looking at that????
dogday_afternoon2002 (11:58:11): hell, yes, wouldnt you
unknown (11:58:32): yesssssssssssss...does she know that???
dogday_afternoon2002 (11:58:54): well, I dont know, I try to be pretty careful
dogday_afternoon2002 (11:59:01): you ever seen cory in her panties
dogday_afternoon2002 (12:00:54): is cory home now
dogday_afternoon2002 (12:01:50): ok then

(29.15Ex.11 at 3855-56).

Lape's entire chat of "daddoesme15" was as follows:

dogday_afternoon2002 (18:31:51): hi baby girl
dogday_afternoon2002 (18:31:59): you like dads cock

(29.15Ex.11 at 3850).

Lape's chat about his prior involvement with 13 and 15 year old girls in "sweetpiece123" included:

dogday_afternoon2002 (18:34:10): you ever been with older guy for real
unknown (18:34:15): yep
dogday_afternoon2002 (18:34:31): cool
unknown (18:34:42): u ever ben with a younger girl for real?
dogday_afternoon2002 (18:34:52): yes
dogday_afternoon2002 (18:34:57): a couple of them
unknown (18:34:58): kewl
unknown (18:35:04): how old?
dogday_afternoon2002 (18:35:22): 13 and 15
unknown (18:35:34): kewl ur girls?
dogday_afternoon2002 (18:35:55): no a neighbor girl and her friend
unknown (18:36:06): hot
unknown (18:36:19): u still do them?
dogday_afternoon2002 (18:36:27): you bet, they have the sweetest little pussies

(29.15Ex.11 at 3857)

Additionally, during "sweetpiece 123," Lape had the following exchange:

unknown (18:47:58): i need a hard cock
dogday_afternoon2002 (18:48:02): did you see my pic on profile

(29.15Ex.11 at 3858).

Lape's computer contained child pornography of young girls with penises in their vaginas and penises in their mouths, along with child pornography of

young girls exposing their breasts and genitalia (29.15Tr.622-28). The file names of such child pornography included: (1) "cumshower.jpg"; (2) "10ondad.jpg" and (3)

"fuck_hardcore_Asian_sex_suck_fucking_gum_animals_gay_lesbian_dog_cat_fish_chicken_horse_good_music_blur_oasis_swayed (1.jpg)" (29.15Tr.623,625-26).

Lape's hard drive contained twenty-nine movies whose file names depicted bestiality (29.15Tr.628-29). Those names included: "pretty teen girl gets anal sex from dog," "animal sex horse rape," "bestiality dog cums on woman's face," and "animalpornmovie – bestiality – prettyteengirlgetsanal.mpg" (29.15Tr.629-30).

From his pretrial computer investigation, Officer James concluded Lape authored the sex chats and not someone else sitting at Lape's computer (29.15Ex.93 at 26). James had known Lape before his death, and concluded from his review of Lape's computer that Lape was "a pervert" (29.15Ex.93 at 38-39).

James testified there was nothing in Lape's computer to link Gill to placing child pornography on it (29.15Ex.93 at 48). James determined that the pornography was placed on Lape's computer before Gill began living with Lape, and therefore, Gill could not have placed it there (29.15Ex.93 at 48). James testified that the sexual images on Lape's computer were last accessed before Gill lived with Lape (29.15Tr.646-47). If James would have found any evidence to connect Gill or co-defendant Brown to placing illegal pornography on Lape's computer, then he would have alerted the prosecutor (29.15Ex.93 at 48-49).

James' Encase report was disclosed to co-defendant Brown's counsel (29.15Ex.93 at 20-21). Lape's hard drive's contents were not put on a disc until Brown's counsel requested them (29.15Ex.93 at 32-38,45-46).

Swingle testified that he filed a motion in Brown's case to exclude all Lape's computer's sexual content as irrelevant (29.15Ex.95 at 44-47). Swingle testified that the trial court in *Brown* ruled that the defense could not present Lape's computer's contents unless the victim impact cast Lape as "a saint" (29.15Ex.95 at 46-47).

Swingle testified that in *Brown*, no evidence was presented that opened the door to the computer evidence (29.15Ex.95 at 46-47). Swingle alerted the victim impact witnesses not to cast Lape as "a saint" or the sexual content evidence would be admissible (29.15Ex.95 at 48-52,68).

Kenyon thought the state painted Lape in penalty as "a saint" (29.15Tr.172-74). Kenyon believed that the child pornography, video bestiality, and on-line chats would have "cast [Lape] in a much different light than what the State was trying to paint in the penalty phase" (29.15Tr.171).

Turlington testified Lape's sexual chats could have been used to rebut the state's portrayal of Lape as a person of great character and would have rebutted the state's portrayal of Lape as an exemplary father (29.15Tr.307).

Turlington testified that the child pornography evidence and evidence that suggested Lape was sexually involved with 13 to 15 year old girls would have

rebutted the state's portrayal of Lape as a person of great character and upstanding citizen (29.15Tr.307-08). Turlington would have wanted to selectively present the assorted sexual content (29.15Tr.318,334).

The postconviction court signed the Attorney General's findings (29.15Tr.666;29.15L.F.510-43). The Attorney General's findings asserted that the sexual content on Lape's computer could be attributed to Gill and that there was no evidence establishing Lape was responsible for Lape's computer's sexual contents (29.15L.F.514,521-22,526,532-33,535-37). *See* Opposition to Cert. Appendix at A48, A55-A56, A60, A66-A67, A69-A71. The Attorney General's findings were signed even though James, the state's computer expert and officer in charge, had concluded Lape authored the sexual chats, James' overall review of Lape's computer had caused him to conclude Lape was "a pervert," and James determined the pornography on Lape's computer was put on Lape's computer before Gill lived with Lape (29.15Ex.93 at 26,38-39,48).[2]

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[2] Throughout its petition, the state characterizes the postconviction findings as those of the postconviction court. Mr. Gill has filed his own petition for certiorari challenging the fundamental fairness of him being denied guilt phase relief when the postconviction judge signed the Attorney General's findings when the state's own police officer computer witness testified victim Lape, and not Gill, put the

In the state's Missouri Supreme Court brief, it argued that Gill's claim, that the postconviction proceedings were fundamentally unfair because the postconviction judge signed the state's findings should not be reviewed because the Attorney General's Proposed Findings were not part of the appellate record (Resp. Br. 48). In response, Gill filed a motion with the Missouri Supreme Court requesting that it accept as part of the record on appeal a copy of the Attorney General's Proposed Findings that was served on counsel who represented Gill in the trial level postconviction court. *See* Opposition to Cert. Appendix at A78-A86. Attached to that motion was a copy of the Attorney General's findings that was served on Gill's trial level postconviction counsel. *See* Opposition to Cert. Appendix at A89-A123. That motion set forth that the reason the appellate record did not contain a document labeled as "Proposed Findings" was the Attorney General had submitted a document denominated as "Findings" with lines left blank for the postconviction judge to insert the date along with the judge's signature, which was exactly what that judge did. *See* Opposition to Cert. Appendix at A81-82. That motion set forth that undersigned counsel had compared side by the side the Attorney General's Proposed Findings with the findings the postconviction judge had signed which showed that the

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inappropriate sexual content on Lape's computer. *See Gill v. Missouri* No. 09-11094.

postconviction judge had signed verbatim the state's findings, as submitted by the Attorney General. *See* Opposition to Cert. Appendix at A81-82.

In response to Gill's motion, the Missouri Supreme Court entered an order designating the Attorney General's Proposed Findings that were served on trial level postconviction counsel as Exhibit 98. *See* Opposition to Cert. Appendix at A126. That order stated that Gill's motion was "sustained subject to the Court's future determination as to the appropriateness of considering the same." *See* Opposition to Cert. Appendix at A126.

On direct appeal, Gill had argued that the victim impact evidence presented exceeded the bounds that this Court had authorized in *Payne v. Tennessee*, 501 U.S. 808 (1991). *State v. Gill*, 167 S.W.3d 184, 195-97 (Mo. banc). The Missouri Supreme Court rejected that claim and noted that "the Millers' discussion of their family's moral values was permissible in that it explained the values held by Mr. Lape." *State v. Gill*, 167 S.W.3d at 196.

The Missouri Supreme Court found that counsels' performance was deficient because they saw the file names on the disclosed Encase report suggesting sexual content, but took no action to investigate what they saw. *Gill v. State*, 300 S.W.3d 225, 233 (Mo. banc 2009). The computer was relevant because it was used to transfer money from Lape's accounts so the money could be accessed with his ATM card. *Id.* at 228 n.2. The Court also found that in light of Officer James' role in preparing the probable cause statement and authoring the

Encase report and his endorsement as a witness, reasonably competent counsel would have interviewed or deposed James. *Id.* at 233. Interviewing or deposing James would have led to discovery of the sexually explicit material because James knew what was on Lape's computer. *Id.* at 233.

Gill was prejudiced because Lape's computer's contents either could have been used to rebut the state's good character evidence or could have been used to dissuade the state from presenting the good character evidence. *Gill v. State*, 300 S.W.3d at 234. Prejudiced was also established because co-defendant Brown's counsel had access to the same information as Gill's counsel, but Brown's counsel uncovered the computer's sexual content and used that knowledge to prevent the state from presenting good character evidence about Lape and Brown was sentenced to life. *Id.* at 230-31, 234.

In finding counsel was ineffective, the Missouri Supreme Court necessarily did not defer to the Attorney General's findings that the postconviction judge signed that Gill, rather than Lape, was responsible for Lape's computer's sexual content, otherwise, it could not have found that counsel was ineffective for failing to uncover Lape's computer's sexual content.

REASONS THE WRIT SHOULD BE DENIED

I. Rebuttal to Victim Impact Is Presumptively Admissible Under This Court's And The Missouri Supreme Court's Decisions

The state's petition is nothing more than a request for error correction, when no error occurred. In fact, the Missouri Supreme was true to what this Court has held as to a defendant's right to rebut victim impact with relevant rebuttal evidence.

The Missouri Supreme Court simply applied this Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984) to a truly unique fact situation. The Missouri Supreme Court established no general rules for investigating "bad victim" evidence or even the presentation of "bad victim" evidence. The Missouri Supreme Court only decided that counsels' failure to review discovery the state provided to them which established that the victim was, in the words of the state's police officer computer expert a sexual "pervert" in a case where the victim was portrayed as a "saint" was unreasonable and the failure to discover that evidence was prejudicial. In light of the content of the evidence and the co-defendant not being sentenced to death, a trial in which counsel did review the discovery and used it to limit victim impact evidence, neither determination was in the least bit remarkable, much less cert-worthy.

Petitioner argues that the evidence Lape had inappropriate sexual content on his computer was presumptively inadmissible because Gill was not allowed "to smear the vicim's character" during penalty phase in order to "suggest the victim deserved to die." (Petition at 10, 15). Petitioner further argues that what the Missouri Supreme Court required of counsel will now result in victims being

"harangued by zealous investigators." (Petition at 17). None of what petitioner asserts is true.

Evidence that rebuts the state's victim impact evidence is **presumptively admissible** under the decisions of this Court. In *Booth v. Maryland*, 482 U.S. 496, 501-02 (1987), this Court held that the Eighth Amendment prohibited the admission of victim impact evidence. In *Payne v. Tennessee*, 501 U.S. 808, 811, 825 (1991), this Court overruled *Booth* to the extent that *Booth* created a per se Eighth Amendment prohibition against victim impact. The *Booth* dissenting Justices, who favored allowing victim impact evidence, stated that "**[n]o doubt** a capital defendant **must be allowed to introduce relevant evidence in rebuttal** to a victim impact statement, but Maryland has in no wise limited the right of defendants in this regard." *Booth*, 482 U.S. at 518 (emphasis added) (opinion of White, J. joined by Rehnquist, C.J., O'Connor, J. and Scalia, J.). *See also Simmons v. South Carolina*, 512 U.S. 154, 164 (1994) (post *Payne* decision holding where state relies on particular evidence to ask for death "elemental due process principles operate to **require admission** of the defendant's relevant evidence in **rebuttal**") (emphasis added). *Payne* adopted the *Booth* dissenting Justices' views as the Court's new majority view. *Payne*, 501 U.S. at 851 (Marshall, J. dissenting). The *Booth* dissenters did note that counsel's decision whether to rebut victim impact evidence or not is not an easy one. *Booth*, 482 U.S. at 518 (White, J. dissenting).

The Missouri Supreme Court's opinion noted that generally neither the state nor the defense is allowed to introduce character evidence about the victim. *Gill v. State*, 300 S.W.3d at 232 (citing *State v. Hall*, 982 S.W.2d 675, 681 (Mo banc 1998)). In *Hall*, unlike here, the state had not injected in the first instance the victims' character. *Hall*, 982S.W.2d at 681. What the Missouri Supreme Court has held in decisions like *Hall* was that a defendant **cannot initiate injecting** evidence of the victim's bad character. In Gill's case, in contrast, the state, through its victim impact witnesses, injected in the first instance that Lape was a person of sterling morals, exceptional integrity, and an extraordinary father worthy of being described as a "Mr. Mom."

What the Missouri Supreme Court recognized in *Gill* was that through injecting Lape's character in the victim impact evidence, the state had "open[ed] the door for the defense to present rebuttal character evidence." *Gill v. State*, 300 S.W.3d at 233. The Missouri Supreme Court has consistently recognized that any competent evidence that explains, counteracts, repels, or disproves evidence of one party can be offered as proper rebuttal by the other party. *State v. Gardner*, 8 S.W.3d 66, 72 (Mo. banc 1999). Lape's computer's sexual content counteracted, repelled, and disproved that Lape was a person of high morals and exceptional integrity. The computer's content counteracted, repelled, and disproved Lape possessed the character and integrity of the "Good Samaritan," a "saint," "Mr. Mom," and a Lincolnesque character. A person who possessed such qualities

would not have child pornography on his computer, would not have boasted on-line to having engaged in sex with minors, would not have solicited on-line sex with minors, created a profile posting his erect penis, and created profiles that listed as his "hobbies" sex of all kinds. "Mr. Mom" would not engage in on-line sexual chats about his sexual attraction for his daughter's anatomy. All this evidence rebutted petitioner's portrayal of Lape as a person of sterling character and it was presumptively admissible evidence as rebuttal evidence. *See State v. Gardner, Booth, Payne, and Simmons v. South Carolina.* Moreover, Lape's computer's contents was proper rebuttal because the Missouri Supreme Court ruled on direct appeal that the state's victim impact was proper because "the Millers' discussion of their family's moral values was permissible in that it explained the values held by Mr. Lape." *State v. Gill*, 167 S.W.3d at 196.

The Missouri Supreme Court has recognized that it is improper for the state to focus in penalty on the "relative worth" of a victim. *State v. Wise*, 879 S.W.2d 494, 516 (Mo. banc 1994) (rejecting claim of improper prosecutorial argument because it did not get into the victim's "relative worth"). An inherent problem that has been recognized with victim impact evidence is that it creates two classes of victims, those whose lives are "so worthwhile" such that their killing is more aggravated so as to cast the defendant as "more deserving" of death, and those whose lives were "not as worthwhile" such that their killing is less aggravated making the defendant "less deserving" of death. *See Hayward v. State*, 24 So.3d

17, 41-43 (Fla. 2009) (prosecutor's argument comparing the character and personal choices of victim to the defendant's character and personal choices was improper); *State v. Gentry*, 888 P.2d 1105, 1166-67 (Wash. banc 1995) (Johnson, J. dissenting) (victim impact evidence creates situation where punishment decision is influenced by whether the defendant "killed a "worthy" member of society or a less "worthy" citizen"); *Windom v. State*, 656 So.2d 432, 440-41 (Fla. 1995) (Kogan, J concurring and dissenting) (courts should not encourage the use of victim-impact evidence to "invite jurors to gauge the relative worth of particular victims' lives."). When the state injected here evidence that Lape was a person of sterling character, outstanding personal morals, and a "Mr. Mom" in character, it sought to create for the jury the dichotomy that Lape was a person whose life was so highly valued in our society's values system that Gill's offense was that much more aggravated and Gill was that much more deserving of death. The Missouri Supreme Court properly recognized that had counsel not been ineffective they were entitled to rebut the state's evidence that this offense was more aggravated because Lape was a salt of the earth person of impeccable character. *See State v. Gardner, Booth, Payne, and Simmons v. South Carolina.* The Missouri Supreme Court did not sanction any notion that the kind of evidence that could have been admitted was proper to establish Lape "deserved to die." (*See* Petition at 15).

In deciding Gill's counsel was ineffective, the Missouri Supreme Court began its analysis by setting forth this Court's standards for evaluating

effectiveness under *Strickland v. Washington*, 466 U.S. 668 (1984). *See Gill v. State*, 300 S.W.3d at 232. In particular, Gill was required to establish counsel's performance was deficient. *Gill v. State*, 300 S.W.3d at 232. The Missouri Supreme Court noted that "[c]ounsel's performance is deficient if it falls below an objective standard of reasonableness, as measured by prevailing professional norms." *Id.* at 232. The second prong of *Strickland* required that Gill was prejudiced. *Id.* at 232. The Missouri Supreme Court noted that under *Strickland* prejudice exists if there is a reasonable probability that but for counsel's deficient performance the jury would have recommended life rather than death. *Id.* at 232.

The Missouri Supreme Court found that Gill's counsels' performance was deficient because they had deposited in their lap Officer James' Encase computer report which contained file names on their face which should have alerted them to inappropriate sexual content. *Gill v. State*, 300 S.W.3d at 233. Furthermore, counsels' performance was deficient because they took no action to interview or depose Officer James, the officer in charge of the investigation of Lape's death, despite Missouri cases which had imposed a duty on counsel to interview or depose investigating officers. *See Clay v. State*, 954 S.W.2d 344, 347-49 (Mo. App., E.D. 1997) (counsel ineffective for failing to interview or depose investigating police officers noting: "[a] prudent lawyer defending a first degree murder charge would be expected to interview the investigating officers"); *Gennetten v. State*, 96 S.W.3d 143, 152 (Mo. App., W.D. 2003) (counsel was

ineffective for failing to investigate a witness and quoting *Clay* for counsel's duty to interview police officers who investigated the defendant). Counsels' failure to interview or depose Officer James stands in stark contrast to the statement Kenyon made to an occurrence witness in Gill's case while deposing a witness who owned lakehouse property with Lape that he "like[s] to take depositions of anybody that has **any kind of familiarity** with the case **at all**...." (29.15L.F.403 transcript at p.4) (emphasis added).

The Missouri Supreme Court had the authority to decide the admissibility of evidence of Lape's character and it decided that evidence was admissible. *See Booth, Payne, and Simmons v. South Carolina*. Further, the Missouri Supreme Court found that if counsel had done what the co-defendant's counsel had done to uncover Lape's computer's contents, they could have used it to dissuade the state from misrepresenting Lape as a person of stellar character and morals or if the state had insisted on misrepresenting Lape's character, then counsel was entitled to rebut that misrepresentation with Lape's computer's contents. *Gill v. State*, 300 S.W.3d at 234.

II. Gill's Case is Controlled By this Court's *Rompilla* Decision Because Counsel Committed A Similar Omission

The *Gill* decision involves nothing more than a straightforward application of *Rompilla v. Beard*, 545 U.S. 374 (2005). In *Rompilla v. Beard*, 545 U.S. 374, 383 (2005), this Court found counsel's performance in that death penalty case was

deficient when counsel failed to examine a court file that contained Rompilla's prior conviction. Counsel's performance was deficient because they were on notice that the government intended to utilize as aggravating evidence Rompilla's violent offense history. *Id.* at 383-84. That prior conviction file contained evidence that would have responded to and rebutted the government's aggravation. *Id.* at 385-86. This Court noted that counsel's performance was deficient because of the ease with which counsel could have examined the court file. *Id.* at 386 n.4. This Court further noted that counsel's obligation to rebut the aggravating evidence went beyond just having objected to the government being allowed to admit the evidence on grounds that it was prejudicial. *Id.* at 386 n.5.

Here counsel had James' Encase report and ignored the obvious – file names that would have put any reasonably competent attorney on notice that Lape's computer contained inappropriate sexual content. As experienced capital counsel, they knew that the state would present victim impact evidence yet they took no action to follow-up the Encase report for evidence that could reasonably be anticipated to rebut that victim impact. *Cf.* Rompilla.

Petitioner complains that counsel could not be ineffective because Gill's counsel objected to its victim impact evidence (Petition at 11). As this Court recognized in *Rompilla*, counsel's obligation goes beyond merely objecting to the state's evidence and includes uncovering evidence that rebuts aggravating evidence. *Rompilla*, 545 U.S. at 386.

Petitioner also complains that counsel could not be ineffective because Gill did not tell counsel about Lape's computer's sexual content (Petition at 3). This Court in *Rompilla* rejected the notion that counsel could forgo examining the court file and instead rely on the defendant or the defendant's family for determining whether there was anything helpful in the court file. *Rompilla*, 545 U.S. at 388. The same was true here, counsel had an obligation to carefully review Officer James' Encase report and to then interview or depose James.

Counsel had a duty in *Rompilla* to review the court file from the prior conviction because the prosecution had indicated that it had intended to rely on its contents. *Rompilla*, 545 U.S. at 389-90. Similarly, Gill's counsel had a duty to review the Encase report with an eye towards whether it would contain rebuttal to victim impact evidence because as experienced capital counsel they had to know the state would be presenting victim impact evidence. *See State v. Gardner, Booth, Payne, and Simmons v. South Carolina.*

The Missouri Supreme Court in evaluating Gill's counsels' performance found it particularly compelling that Gill's co-defendant's counsel, who had access to the same reports from Officer James, uncovered Lape's computer's sexual content. *Gill v. State*, 300 S.W.3d at 230-31. The co-defendant's counsels' actions of uncovering Lape's computer's sexual content is a perfect measure of Gill's counsels' unreasonableness because counsel for both defendants were similarly situated in having Officer James' reports.

Rompilla was prejudiced because had counsel looked at the prior conviction court file they would have found a range of mitigation leads that were not furnished through other sources. *Rompilla*, 545 U.S. at 390. Once counsel had the obligation to examine the court file, they could not ignore "red flags" that would have led to favorable matters. *Id.* at 391 n.8. In Gill's case, the "red flags" the Missouri Supreme Court recognized were file names in James' Encase report such as "a_slutty18girl_w38c," "daddoesme15," "lilnichole14," "sweet_ tasting_slute," "sweetgirl4older," "sweetpiece123." *Gill v. State*, 300 S.W.3d at 228.

Justice O'Connor, in her *Rompilla* concurrence, noted that counsel's failure to review the court file was the result of inattention and not a reasoned strategic judgment. *Rompilla*, 545 U.S. at 395-96 (O'Connor, J. concurring and relying on *Wiggins v. Smith*, 539 U.S. 510, 534 (2003)). Counsel's deficient performance here is even more egregious than what Justice O'Connor recognized was the case in *Rompilla*. Gill's counsel had Officer James' report with its sexually suggestive file names, but did nothing to follow-up on that information through either interviewing or deposing James. *Gill v. State*, 300 S.W.3d at 233.

The mitigation case in *Rompilla* that could have been built through examining the court file and following-up on the "red flags" established Rompilla was prejudiced. *Rompilla*, 545 U.S. at 391-93. Here, Prosecutor Swingle testified that he did not present any victim impact evidence in the co-defendant's trial that

would have opened the door to Lape's computer's sexual contents (29.15Ex.95 at 46-47). The reason Swingle did not was that the co-defendant's counsel, unlike Gill's counsel, had uncovered Lape's computer's sexual contents and the trial court had ruled that if Swingle cast Lape as "a saint," then Lape's computer's sexual content was admissible (29.15Ex.95 at 46-52, 68). The Missouri Supreme Court properly reasoned that Gill was prejudiced because the co-defendant getting life when the prosecutor refrained from injecting evidence Lape was a person of impeccable character established a reasonable probability of a different result. *Gill v. State*, 300 S.W.3d at 230-31, 234. The Missouri Supreme Court further found that Brown's life sentence could not be attributed to different factual scenarios because both Brown and Gill alleged the other shot Lape. *Gill v. State*, 300 S.W.3d at 231 n.4.

In a like manner to *Rompilla*, the Missouri Supreme Court found that Gill was prejudiced through counsels' failure to do the obvious. Gill was prejudiced because Lape's computer's contents either could have been used to rebut the state's good character evidence or could have been used to dissuade the state from presenting the good character evidence. *Id.* at 234. Prejudiced was also established because co-defendant Brown's counsel had access to the same information as Gill's counsel, but Brown's counsel uncovered the computer's sexual content and used that knowledge to prevent the state from presenting good

character evidence about Lape and Brown was sentenced to life. *Id.* at 230-31, 234.

The petitioner, as it did in the Missouri Supreme Court, seeks to mislead this Court by presenting only an out of context snippet of Kenyon's testimony that he is vigilant about not wanting to be perceived as "kicking a corpse." (Petition at 15). Petitioner does this in order to obfuscate the truth to claim counsel exercised reasonable strategy (Petition at 15). The Missouri Supreme Court declined to sanction such attempt and this Court should too. Kenyon's "kicking a corpse testimony" in context was as follows:

> Q. And when did you have -- so you reviewed this in a month. Had you known about this at the time of trial, how would you have used it?
>
> A. We would have alerted -- it's difficult to know exactly how it would have been used in trial, because we are in a precarious position as defense attorneys in this case because there's an expression which seems like a callous expression, but it's very true and we use it in our trade, which is you don't kick a corpse. In penalty phase, you don't try and slam a victim by showing bad things that the victim may have done. That generally doesn't go over well with juries.[3]

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[3] Petitioner only quotes Kenyon to this point and fails to reproduce the balance of Kenyon's testimony that immediately followed. *See* Petition Appendix at A-19.

Q. All right.

A. So you have to be very careful about introducing anything that in any way demeans or disrespects the memory of the person who was the deceased. But on the other hand, having that information in your hand, you can utilize it as a bargaining chip, if nothing more, with the prosecuting attorney's office letting them know that should you attempt to try and paint a picture of the victim as being an angel, it is important that the jury does get the whole picture. And so it would probably have been something -- I don't suspect it would have been something that I would have made any effort to try and introduce in the defendant's case in chief in the penalty phase. But it certainly would have been something that I would have strongly considered using in rebuttal or even for cross examination purposes of State's witnesses to the extent that they would adduce evidence that the victim was a saint.

Q. Do you think that Mr. Lape was painted as a saint in your case?

A. Yes.

Q. So from what you're saying is if you had this information and he was painted as a saint, would you have used it?

A. Yes.

(29.15Tr.172-73). Thus, Kenyon indicated without reservation that had he known of Lape's computer's sexual contents that he would have used it to rebut

respondent's evidence or to prevent respondent from misrepresenting Lape as a person of exceptional integrity. Turlington, likewise, testified Lape's computer's sexual content could have been used to rebut the state's portrayal of Lape as an exemplary father and person of the highest moral character (29.15Tr. 307-08).

The Missouri Supreme Court's finding of deficient performance in the handling of Officer James' computer police report and failure to interview or depose Officer James is consistent with what other courts have ruled when counsel who had police reports failed to take reasonable actions based on the contents of those reports. When counsel obtains a police report, counsel is required to utilize the information contained in that report in order to conduct reasonable investigation intended to further the client's defense and the failure to do so constitutes deficient performance. *See, e.g., Pillette v. Berghuis*, 630 F.Supp.2d 791, 801 (E.D. Mich. 2009) (failure to utilize police report to corroborate defendant's testimony was deficient performance and prejudicial); *In re Cordero*, 756 P.2d 1370, 1382-83, 1386 (Ca. banc 1988) (failure to investigate evidence of defendant's PCP use recounted in police report was deficient performance and prejudicial as to intoxication defense); *Commonwealth v. Phinney*, 843 N.E.2d 1024, 1028-31, 1033 (Ma. 2006) (failure to utilize police reports that identified someone else as homicide suspect deficient performance and prejudicial); *Espinal v Bennett*, 588 F.Supp.2d 388, 399-408 (E.D.N.Y. 2008) (failure to investigate information in redacted police report that would have corroborated defendant's

alibi defense was deficient performance and prejudicial); *Garay v. State*, 53 P.3d 626, 626-29 (Alaska Ct. App. 2002) (counsel's failure to conscientiously review police report and take appropriate action required vacating guilty plea); *Washington v. Smith*, 219 F.3d 620, 625-26, 629, 634 (7th Cir. 2000) (counsel who failed to decipher handwriting in police report regarding matters that would have led to critical evidence supporting alibi defense and lack of defendant's connection to weapons used constituted deficient performance that was prejudicial).

Moreover, the Missouri Supreme Court's *Gill* decision is consistent with other courts' decisions finding counsel was ineffective for failing to investigate rebuttal evidence. It is generally recognized that counsel's failure to prepare evidence to rebut evidence that reasonable counsel ought to have anticipated constitutes ineffective assistance of counsel. *See, e.g., Couch v. Booker*, 650 F.Supp.2d 683, 692-95 (E.D. Mich. 2009) (counsel was ineffective for failing to investigate and obtain a pathologist who could have rebutted state's pathologist that cause of death was accident, rather than homicide and required new trial); *Thomason v. Jamrog*, 2008 W.L. 2761042 *9-*10 (E.D. Mich. July 15, 2008) (counsel's performance deficient for failing to obtain expert to rebut state's expert on memory repression theory, but defendant not prejudiced); *Millam v. State*, 745 N.W.2d 719, 721-24 (Ia. 2008) (counsel's performance deficient for failing to offer evidence in sexual abuse trial to rebut alleged victim's testimony that she had made prior false accusations of sexual abuse and new trial required). *Cf. Taylor v.*

State, 262 S.W.3d 231, 237-48 (Mo. banc 2008) (defendant was prejudiced by absence of evidence that could have been used to contradict state's witness).

Under this Court's decisions in *Booth, Payne, and Simmons v. South Carolina,* evidence that rebuts victim impact evidence is presumptively admissible. Under Missouri law, Lape's computer's sexual content was presumptively admissible rebuttal evidence because it counteracted, repelled, and disproved Lape was a person of exemplary moral character and a father worthy of being referred to as "Mr. Mom." *See Gardner, supra.* Thus, counsel was obligated to investigate the obvious that appeared in James' computer analysis.

In *Gill*, petitioner presented victim impact evidence that the victim was a person of sterling character of the highest moral fabric and a father of exemplary character. Counsel knew the state would be presenting victim impact and had Officer James' report which listed file names that would have alerted reasonable counsel to the sexual content on Lape's computer. Despite that knowledge and possession of Officer James' computer report, counsel did not follow Missouri law and interview and depose the police officer who had investigated the case. *See Clay* and *Gennetten*. Moreover, that Gill's counsels' performance was deficient is established because the co-defendant's counsel, who had access to James' reports, uncovered Lape's computer's contents and used that information to prevent the state from misrepresenting Lape's character to the jury. Prejudice to Gill was

demonstrated because when the state was prevented from misrepresenting Lape's character to the jury, the co-defendant obtained a life sentence.

III. There Is No Caselaw Conflict On The Presumptive Admissibility Of Rebuttal To Victim Impact Evidence

Petitioner asserts that there now is a conflict between jurisdictions as to whether counsel can be deemed ineffective for failing to discover inadmissible evidence. This Court has made clear through its decisions that rebuttal to victim impact evidence is presumptively admissible. *See Booth, Payne, and Simmons v. South Carolina.* Thus, there is no conflict to support granting the state's petition.

The cases petitioner cites have no application to the issue of the effectiveness of counsel for failing to rebut victim impact evidence. In *DeSchon v. State*, 197 P.3d 476, 481-82 (Mont. 2008), counsel was not ineffective for failing to introduce inadmissible evidence of victim bad character in the defense case in chief. In *Cummings v. Sirmons*, 506 F.3d 1211, 1232-33 (10th Cir. 2007) counsel was found not to have been ineffective for failing to impeach and cross-examine a state's witness with his prior convictions and mental health history. Neither of these cases involve counsel having failed to rebut victim impact evidence, and thus, there simply is no conflict in the law for this Court to address.

IV. LACK OF JURISDICTION

A. Necessity To Choose Between The Missouri Supreme Court's And Attorney General's Factual Findings

This Court defers to factual findings of state courts, even when the findings relate to a constitutional issue. *Hernandez v. New York*, 500 U.S. 352, 366 (1991). *See also*, *Snyder v. Louisiana*, 552 U.S. 472, 486 (2008) (Thomas, J. and Scalia, J. dissenting and citing *Hernandez* for this principle). The motivating principle behind deference to state court findings is considerations of federalism. *Sumner v. Mata*, 449 U.S. 539, 547 (1981).

In a similar vein, the Missouri Supreme Court normally defers to postconviction trial court factual findings. *State v. Taylor*, 929 S.W.2d 209, 224 (Mo. banc 1996). In order for the Missouri Supreme Court to have concluded counsel was ineffective for failing to uncover Lape had put offensive sexual content on his computer, however, it had to reject the Attorney General's factual findings, that the postconviction judge signed as the findings of a court, that Gill put the offensive content on Lape's computer, rather than Lape put it on his own computer. If this Court were to grant certiorari, then it would be placed in the untenable position of having to choose whether to defer to the Attorney General's factual finding the postconviction trial court signed that Gill was responsible for Lape's computer's sexual content or the Missouri Supreme Court's factual finding, based on Officer James' testimony, that Lape was responsible for the sexual content on his own computer. Prudential federalism considerations require this Court deny certiorari because it is not the role of this Court to decide whether

to apply the Attorney's General's rendition of "the facts" that the postconviction judge signed or the facts the Missouri Supreme Court properly found.

B. Hypothetical Facts – Petitioner Lacks Standing

This Court has recognized that "'[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332, 341-42 (2006) (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997)). The Article III standing requirement enforces the Constitution's case or controversy requirement. *Daimler*, 547 U.S. at 342. In *Daimler*, this Court concluded that the plaintiffs lacked standing because the alleged injury was "conjectural or hypothetical" because it depended on how legislators responded to a reduction in revenue. *Daimler*, 547 U.S. at 344.

Petitioner has argued that this Court should grant certiorari because the Missouri Supreme Court's decision mandates that capital defense counsel investigate victims' backgrounds such that a victims' families will "be harangued by zealous investigators" to uncover unfavorable material about the victims such that the *Gill* opinion "requires capital-defense counsel to drag murder victims through the mud" (Petition at 16-17). According to petitioner, the *Gill* opinion will lead to investigators interrogating the murder victims' friends and relatives about the victim's character flaws (Petition at 18).

The Missouri Supreme Court's opinion only imposed on counsel the duty to carefully examine police reports that were provided to counsel in discovery and to interview or depose police officers who investigated the defendant. The facts of this case do not involve investigators pursuing survivors to acquire bad character evidence about a victim. The horrors that petitioner posits warrant this Court's review are just as conjectural and hypothetical as the injury alleged in *Daimler*, and therefore, petitioner lacks standing here.

CONCLUSION

This Court should deny certiorari because rebuttal evidence to victim impact evidence is presumptively admissible and constitutionally required to be allowed under this Court's decisions. Gill's counsel were obligated to investigate the police computer expert, Officer James, who knew the victim's computer contained sexual content that would have rebutted petitioner's misrepresentation of the victim as a person of the highest moral character and personal integrity. Reasonable counsel who had Officer James' report would have uncovered Lape's computer's sexual content because of the file names that appeared in that report. There is no conflict between jurisdictions as to the admissibility of evidence that rebuts victim impact evidence and the effectiveness of counsel in failing to present such rebuttal.

Further, this Court should deny certiorari because it lacks jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22ND day of JUNE, 2010, two true and correct copies of the foregoing were mailed postage pre-paid to the Office of the Attorney General, P.O. Box 899 Jefferson City, Missouri 65102.

William J. Swift